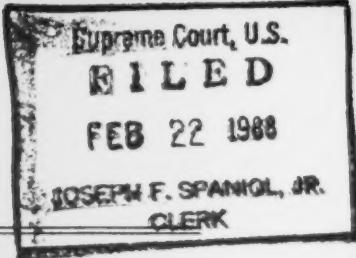


No. 87-1196



In the Supreme Court  
OF THE  
United States

OCTOBER TERM, 1987

ATLANTIC RICHFIELD COMPANY,  
*Petitioner*,

VS.

JOHN V. NIELSEN  
*Respondent.*

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REPLY BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEAL OF CALIFORNIA,  
FOURTH APPELLATE DISTRICT

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**TABLE OF CONTENTS**

	<u>Page</u>
Table Of Authorities .....	ii
Reply Brief .....	1
1. Nielsen's Highly Misleading Statement Of Substantive Facts.....	2
2. Nielsen's Erroneous Argument That ARCO Waived Yet Unannounced Constitutional Rights.....	3
3. Nielsen's Misleading Arguments On The Mer- its .....	9
Conclusion .....	10



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The Petition (at 13-20) demonstrates the many respects in which the \$3,500,000 punitive damage award in this case is grossly excessive when compared to fines for comparable conduct, other punitive damage awards in comparable cases, the Respondent's injury and the culpability of ARCO's conduct, and, therefore, should be scrutinized under any new Constitutional principles that this Court announces in either *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765 ("Bankers Life"), which was argued on November 30, 1987, or *The Ohio Casualty Insurance Co. v. Downey Savings and Loan Ass'n*, No. 87-159 ("Downey Savings"). The briefing and argument in those cases establish the reasons why this Court must depart from existing precedent to announce a new constitutional right to be free of unlimited and standardless punitive damage awards and the historical and legal bases for so departing.

Petitioner Atlantic Richfield Company ("ARCO") respectfully submits this brief only to reply to the principal new

arguments raised in the Brief In Opposition ("Br. Opp.") of Respondent John V. Nielsen ("Nielsen") that are most important to this Court's decision to accept review.

### **1. Nielsen's Highly Misleading Statement Of Substantive Facts**

Nielsen's Statement of Substantive Facts (Br. Opp. 3- 9) is totally misleading, as ARCO will demonstrate in its briefs on the merits. However, a brief reply now is necessary to Nielsen's suggestion that the \$3,500,000 punitive damage award was appropriate, and is undeserving of review, because this case involved a company-wide program to defraud all ARCO dealers. Thus, Nielsen asserts that ARCO had a crash program to salvage its retail gasoline division by converting retail stations into mini-markets. He also asserts that ARCO engaged in a practice of "suppl(ying) station operators with false profit data and misleading descriptions of its analysis and expertise." (Br. Opp. 1-2.) It was exactly this emotional approach that caused the jury to award enormous punitive damages.

However, there is no truth in any of these assertions. Mr. Nielsen has not pointed to one scrap of admissible evidence — because there is none — that ARCO misled any other dealer. In fact, Nielsen's Statement effectively concedes (Br. Opp. 6-7), the principal alleged fraud was that lower level employees of ARCO fabricated data unique to Nielsen's station in order to justify ARCO's conversion of that station into a mini-market. ARCO then invested over \$140,000 of its own money (and Mr. Nielsen invested \$26,000) based upon this allegedly fraudulent justification.

ARCO submits that, when, as in this case, a \$3,500,000 punitive damage award can be affirmed on the basis of a highly illogical claim of fraud by low level employees that injured a single individual, there can be no question that state limitations on such awards are ineffective and that federal constitutional limitations are needed to protect defendants from unfair and capricious punitive damage

awards.<sup>1</sup> The facts of this case, even more than those of *Bankers Life and Downey Savings*, cry out for the application of such standards.

## 2. Nielsen's Erroneous Argument That ARCO Waived Yet Unannounced Constitutional Rights

Nielsen contends that ARCO waived any rights to object to the punitive damage award under the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment that this Court might announce in *Bankers Life* or *Downey Savings* by not "properly rais[ing] in state court proceedings" the constitutional questions presented here. (Br. Opp. 14-21.) Nielsen's waiver argument, however, is based upon misstatements of (1) the test for determining waiver articulated in the very opinions he cites and (2) the availability of these constitutional rights at the time of ARCO's alleged waiver.

Nielsen cites *Smith v. Murray*, 477 U.S. \_\_\_, 91 L. Ed. 2d 434, 446 (1986), and *Engle v. Isaac*, 456 U.S. 107, 130-34 (1982), as having developed in a "closely analogous context" the rule that "the perceived novelty or futility of a claim does not excuse the failure to raise it." (Br. Opp. 15.) *Smith* did hold that the petitioner there could not rely on the novelty of his claim as an excuse for not raising it in state court. However, the *Smith* Court quoted with approval the following language from *Reed v. Ross*, 468 U.S. 1, 18 (1984):

" '[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.' \* \* \*"

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<sup>1</sup>Nielsen notes that the trial judge commented that the jury could have arrived at a "larger number" for punitive damages. (Br. Opp. 9-10 n.4.) He fails to note that the trial judge so believed only because of the "broad discretion given to juries" and also stated that "it is pretty clear that punitive damages are getting out of hand." (Reporter's Transcript, Vol. XIV, p. 22.)

477 U.S. at \_\_\_\_; 91 L. Ed. 2d at 446. The *Smith* opinion proceeded to articulate the test for determining when a federal claim need not be raised in accordance with state procedures, as follows:

“[T]he question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all.”

(*Id.*) Similarly, the *Engle* Court, after noting that “numerous courts” had accepted the position defendant then urged and others had rejected it, concluded that the issue there had been waived only because it was “a live one in the courts at the time” of the waiver. 456 U.S. at 132-33 & n.41.

To the contrary, the constitutional claims presented here — that either the Eighth Amendment or the Due Process Clause limits punitive damage awards in civil cases — were not, and still are not, “available.” Nor were the issues raised by these claims “live ones” at the time ARCO was before the California trial court and Court of Appeal. Nielsen’s attempt to prove that these issues have been “fermenting in California and other courts for years” (Br. Opp. 15:17-18) proves just the opposite. First, Nielsen’s demonstration makes no mention of *Ingraham v. Wright*, 430 U.S. 651, 664 (1977), in which this Court described as a “longstanding limitation” the principle that the Eighth Amendment applies only to criminal proceedings. *See* Petition, at 10.

Moreover, Nielsen cites a string of cases which demonstrate that the California courts have consistently held themselves foreclosed by decisions of this Court (and then the California courts) from applying either the Eighth Amendment or the Due Process Clause to punitive damages in civil cases. (Br. Opp. 12-13 n.7.) The string begins with *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 716-17, 719, 60 Cal. Rptr. 398 (1967), where the Court of Appeal rejected the argument that the Constitution required criminal safeguards in punitive damage cases simply by noting that the argument had “no case” support and that this Court had “considered and rejected arguments similar to those now urged.” It also rejected the argument that there were insufficient standards

to control the circumstances in which punitive damages were awarded and the amount of such awards with the conclusion that such awards provided "no offense to the Constitution, and no deprivation of any constitutional right." The other districts of the California Court of Appeal, including the Fourth (which decided this case), by rote followed *Toole* with one-sentence decisions (quoted below) that never analyzed the constitutional issues.<sup>2</sup> The California Supreme Court uniformly has rejected the constitutional argument with similar one-sentence rulings; "not[ing] in passing that on several occasions section 3294 [authorizing punitive damages] has been held constitutional,"<sup>3</sup> refusing "at this late date \* \* \* to hold the section [authorizing punitive damages] unconsti-

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<sup>2</sup>*Fletcher v. W. Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 404-05, 89 Cal. Rptr. 78 (1970) (4th Dist.) ("An essentially similar contention was made and rejected in *Toole* \* \* \*"); *Wetherbee v. United Ins. Co.*, 18 Cal. App. 3d 266, 272, 95 Cal. Rptr. 678 (1971) (1st Dist.) (*Toole* "reject[ed] an identical argument, [and] noted that the United States Supreme Court rejected such contentions"); *Gibson v. Gibson*, 15 Cal. App. 3d 943, 949, 93 Cal. Rptr. 617 (1971) (3d Dist.) (citing only *Toole*: "We reject the contention, however, that the due process principles regarding incompetent counsel in criminal proceedings should be transported into civil proceedings, even those involving punitive damages"); *Zhadan v. Downtown L.A. Motors*, 66 Cal. App. 3d 481, 501-02, 136 Cal. Rptr. 132 (1976) (2d Dist.) ("Both of these contentions have been rejected by the courts of this state"); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 811, 174 Cal. Rptr. 348 (1981) (4th Dist.) ("Ford's contention that the statute is unconstitutional has been repeatedly rejected"). This demonstration, as well as the California Supreme Court opinions discussed in the text, refutes, at least in this context, several of Nielsen's arguments: (1) that "[i]t is not uncommon for different districts to reach opposite conclusions on important, current issues" (Br. Opp. 20 n.13); (2) that a state court that has previously rejected a constitutional issue may change its mind (*id.*); and (3) that the "California cases had previously framed the issues." (Br. Opp. 17: 15-16.) Those cases had foreclosed, not framed, the constitutional issues.

<sup>3</sup>*Bertero v. Nat'l Gen. Corp.*, 13 Cal. 3d 43, 66 n.13, 118 Cal. Rptr. 184 (1974).

tutional — a proposition that has been frequently rejected,<sup>4</sup> and stating “[i]t is not necessary to devote extensive discussion to the question; the courts have frequently and uniformly upheld that provision's validity.”<sup>5</sup> Most recently, the Court of Appeal in *Downey Savings & Loan Ass'n v. The Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 1101, 234 Cal. Rptr. 835 (1987), cited *Ingraham* to support its one-sentence decision that “the Eighth Amendment applies only to criminal actions, not to purely civil penalties, as involved here,” and cited *Toole* to support its other one-sentence decision that “[w]here, as here, the action is civil in nature, civil rules rather than criminal rules of procedure apply.”

None of the California opinions contains any analysis of the constitutional provisions, their history or their purposes, and none either discusses the application of the Constitution to the particular facts of the case or suggests that the constitutional issues are open or difficult. Unlike in *Engle*, there are *no* cases from *any* jurisdiction that accept the constitutional rights claimed here. In these circumstances, there was no reason for ARCO to have claimed the rights in these state courts that have uniformly held that they are bound by this Court's precedent to reject those rights. Moreover, as indicated by the lack of analysis of the issues or the particular facts in *Downey Savings*, there was no benefit to be gained by so doing. The right simply was not “available” in state court, and under *Reed*, *Smith* and *Engle*, ARCO had cause not to raise it.<sup>6</sup>

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<sup>4</sup>*Egan v. Mut. of Omaha Ins. Co.*, 24 Cal. 3d 807, 819-20, 157 Cal. Rptr. 482 (1979).

<sup>5</sup>*Hasson v. Ford Motor Co.*, 32 Cal. 3d 388, 402 n.2, 185 Cal. Rptr. 654 (1982).

<sup>6</sup>Nielsen grossly overstates ARCO's position as eliminating “for most cases” the benefits of the rule providing that federal constitutional issues ordinarily must first be presented to the state courts. (Br. Opp. 15: 3-8.) ARCO contends only that issues are not waived until a decision of this Court changes clearly existing law and announces a new right. Of course, only a litigant whose time to seek

As explained in the Petition (at 10-11), this Court's opinion in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967), establishes that a litigant cannot waive a constitutional defense "prior to the announcement of a decision which might support it." Nielsen describes *Butts* as inapposite, because it involved an alleged waiver in a federal court and at the trial level. Therefore, Nielsen contends that *Butts* did not involve the requirement of properly raising federal issues in the state courts. (Br. Opp. 16:4-18.) However, there is no justification either in *Butts* or elsewhere to limit its waiver holding to proceedings in federal court. And, Nielsen also contends that ARCO waived its constitutional defense at the trial court, because "under applicable California procedural requirements, ' "[a] claimed violation of a constitutional right must be raised in the trial court to preserve the issue for appeal." ' " (Br. Opp. 19 n.12.) This case (assuming the Court announces a new constitutional right in *Bankers Life*) shares with *Butts* the determinative factor of an important decision of this Court announcing a new constitutional right subsequent to the alleged waiver. Moreover, this Court has applied the same reasoning underlying *Butts* to reject the same type of jurisdictional challenge Nielsen asserts here. For example, in *O'Connor v. Ohio*, 385 U.S. 92, 93 (1966), the Court held that a "failure to object in the state courts cannot bar the petitioner from asserting this federal right," where the federal right was announced for the first time in a decision after the completion of petitioner's state court appeals. The Court refused to charge the petitioner with "anticipating" its decision.

Nielsen also seeks to dismiss as *dictum* the description in *State Farm Mutual Automobile Insurance Co. v. Duel*, 324 U.S. 154 (1945), as a "customary procedure" (and therefore obviously an accepted procedure) the vacating of a judgment so that the state court can consider a constitutional issue not presented below but now available as a result of an intervening decision by this Court. While it is true, as the Petition (at 13:1-2) disclosed, that the Court did not follow the procedure

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review in this Court has not expired can obtain the benefits of such a new decision.

in *Duel*, the Court clearly endorsed the procedure and its rationale. The Court stated that “[w]e do not think appellant should be prejudiced by the fact that the decision came too late for it to obtain a ruling by the Wisconsin Court.” (324 U.S. at 161.) It also stated that it “would not hesitate to adopt the procedure in the interests of justice if it appeared that otherwise appellant would be foreclosed from an adjudication of the issue.” (*Id.*) Nothing in the opinion supports Nielsen’s first purported distinction of *Duel* — that the procedure applies only where this Court seeks to avoid unnecessary adjudication of federal questions. And, Nielsen’s second purported distinction — that the “extensive discussion” of the constitutional issues presented here should have caused ARCO to raise the issues even before this Court announces a new right in *Bankers Life* — is answered by the cases that show that the issues were foreclosed, not alive. *See* pp. 4-6, *supra*. Therefore, this Court can follow *Duel* to vacate the California Court of Appeal’s decision and remand this case for an initial state court consideration of any new constitutional standards.

Finally, Nielsen contends that ARCO’s citation of the Eighth Amendment to the California Supreme Court was too “casual” to apprise that court of the constitutional argument under this Court’s recent decision in *Bd. of Directors of Rotary Int’l v. Rotary Club*, 481 U.S. \_\_\_, 95 L. Ed. 2d 474, 487 n.9 (1987). (Br. Opp. 19.) However, the *Rotary* holding that “casual reference to a federal case \* \* \* is insufficient” is inapposite. There, the petitioner merely cited an opinion that made the argument at issue, but did not mention the argument. Here, ARCO not only cited the *Bankers Life* case, it specifically identified the argument as whether the punitive damage award violates the “Eighth Amendment’s prohibition against ‘excessive fines.’” (Petition, at 11-12.) This is more than sufficient. *Eddings v. Oklahoma*, 455 U.S. 104, 114 n.9 (1982) (this Court’s jurisdiction “does not depend on citation to book and verse”). Nielsen’s final argument — that ARCO’s presentation to the Supreme Court was too late under state law — is answered by the *Butts* ruling that only known rights can be waived (388 U.S. at 143) and the *O’Connor* application of that principle, which holds that a

state procedural rule cannot bar the assertion of a newly announced federal claim. (385 U.S. at 93.)

### 3. Nielsen's Misleading Arguments On The Merits

As noted above, the defendants in *Bankers Life, Downey Savings* and this case have amply demonstrated the need for federal constitutional limitations on punitive damages. ARCO here replies only to several misleading arguments in Nielsen's Brief for not applying any such limitation to this case.

Nielsen asserts that the Court of Appeal did not rely exclusively on ARCO's wealth in approving the enormous punitive damages in this case. (Br. Opp. 22:1-14.) The Opinion (Petition, Appendix A) and Order Modifying Opinion (*Id.*, Appendix B) thoroughly refute this assertion by showing that the court simply stated but did not analyze any other factors. (See Petition, at 14; App. A, at 40a-41a; App. B, at 44a.) The Court of Appeal's statement that "'under *any traditional formula* the amount is reasonable'" (as quoted at Br. Opp. 27:12-14) explicitly cited only ARCO's wealth as entering into the formula. (See Petition, 41a.) Nielsen's assertion that the \$3,500,000 award is not a "trend-setter" nor "out-of-line" is belied by (1) the fact that it is exceeded in published California opinions only by *Downey Savings* and (2) the \$15,000 punitive damages awarded in the concededly "closely analogous" case of *Hartman v. Shell Oil Co.*, 68 Cal. App. 3d 240, 137 Cal. Rptr. 244 (1977). Finally, Nielsen's suggestion that the California legislature recently has paid attention "to determining what is 'excessive' punitive damages in a given case" (Br. Opp. 24-25) is both incorrect and irrelevant. As Nielsen concedes (*Id.* 25:11-12), the legislature set no limits on, or standards for, the size of punitive damage awards. Moreover, the legislature's failure to set such standards has no bearing on this Court's right to invalidate state laws that infringe on constitutional rights.

## CONCLUSION

For the reasons stated in the Petition and in this Reply, the Court should grant the petition and either reverse or remand the \$3,500,000 punitive damage award for a state court determination of its propriety under standards the Court articulates in *Bankers Life* or *Downey Savings*.

February 22, 1988.

Respectfully submitted,

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## **PROOF OF SERVICE BY MAIL**

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On February 22, 1988, I served the within Reply Brief in re: "Atlantic Richfield Company v. John V. Nielsen" in the United States Supreme Court, October Term 1987, No. 87-1196.

On the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

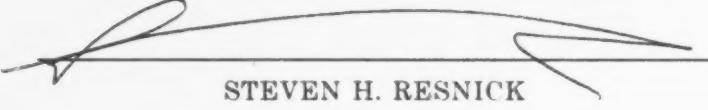
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All Parties required to be served have been served.



I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on February 22, 1988, at Los Angeles, California.



STEVEN H. RESNICK